



June 20, 2002

Mr. Jason Martinson
Open Records Coordinator
Texas Parks & Wildlife
4200 Smith School Road
Austin, Texas 78744-3291

OR2002-3360

Dear Mr. Martinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164592.

The Texas Parks and Wildlife Department (the "department") received a request for a copy of a game warden's personnel file. You indicate that you are willing to release some information to the requestor but claim that portions of the information you have submitted to this office are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, and 552.130 of the Government Code. Although you also raise section 552.108 as a possible exception, you do not explain how it would apply to the submitted information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments explaining why stated exceptions apply). Section 552.108 is a discretionary exception, and by failing to raise it properly, you have waived its protection. *See* Gov't Code § 552.302 (failure to comply with requirements of section 552.301 results in presumption that information is public and must be released unless compelling reason to withhold is shown); Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests); *see also* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 522 at 4 (discretionary exceptions in general). We have considered the other exceptions you claim and reviewed the submitted information.¹

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that Exhibits B-1, 2, and 4 each contain information that is made confidential by federal law. Section 552.101 of the Government Code encompasses information that is made confidential by other statutes. The Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Upon review of the submitted information, we conclude that the information we have marked is confidential under the ADA and therefore must be withheld under section 552.101.

You assert that the portions of Exhibit B-2 referring to a criminal arrest that was expunged by court order are confidential under article 55.03 of the Code of Criminal Procedure and therefore excepted from disclosure under section 552.101. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, dissemination, or use *of the expunged records and files* for any purpose is prohibited;
- (2) except as provided in Subdivision 3 of the article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order;
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Code Crim. Proc. art. 55.03 (emphasis added).² You have submitted the expunction order. After reviewing it, we find that the marked information is not part of the records or files that were the subject of the order. Because this information is not confidential under article 55.03, it may not be withheld pursuant to section 552.101 on this basis.

You also assert that the information relating to the expunged arrest must be withheld under section 552.107 of the Government Code. Section 552.107(2) excepts information from disclosure if "a court by order has prohibited disclosure of the information." As noted above, the information you seek to withhold in Exhibit B-2 is not itself a record subject to the order. Consequently, we find that this information may not be withheld on the basis of section 552.107(2).

You assert that the portions of the submitted information in Exhibit B-4 are excepted from disclosure on the basis of common law privacy as well as section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test for information claimed to be protected under the doctrine of common law privacy incorporated by section 552.101. Accordingly, we will address these claims together.

Section 552.101 of the Government Code encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have reviewed the information in Exhibit B-4 that you

² We note that article 55.03 has been amended in the time since these records were created. However, these amendments were non-substantive. For convenience, we cite the current, amended version.

claim is excepted and have marked those portions that are protected by common law privacy and must be withheld under section 552.101. Other information you seek to withhold is not protected by common law privacy and may not be withheld on that basis. *See* Open Records Decisions Nos. 342 (1982), 329 (1982) and 298 (1981) (qualifications of public employee, including experience, licenses and certificates, professional awards and recognition, tenure, salary, educational level, membership in professional organizations, and previous employment are available to public); *see also* Gov't Code § 411.082(2)(B) (driving records are not criminal history record information).

You also assert that the marked information in Exhibit B-4 is protected by constitutional privacy, which is also incorporated by Section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We have reviewed the marked information in Exhibit B-4 and find that none of it is protected by constitutional privacy.

We note, however, that some of the information you seek to withhold in Exhibit B-4 as well as other information in Exhibits B-1 and 2 is subject to section 552.117 of the Government Code. Pursuant to section 552.117(2) a governmental body must withhold certain information about commissioned peace officers, as that term is defined by article 2.12 of the Code of Criminal Procedure. The game warden who is the subject of this request is a commissioned peace officer.³ Accordingly, the department must withhold those portions of the records that reveal the officer's current and former home addresses and telephone numbers, his social security number, and any information that reveals whether the officer has family members. We have marked the portions of Exhibits B-1, 2, and 4 that the department must withhold.

Finally, you claim that the warden's driver's license number is confidential. Section 552.130 of the Government Code excepts from disclosure information relating to "a motor vehicle operator's or driver's license or permit issued by an agency of this state." Gov't Code § 552.130(a)(1). We agree that you must withhold the warden's driver's license information, which we have marked, in accordance with section 552.130.

³ Under Texas law, a game warden is a commissioned peace officer. *See* Code Crim. Proc. art. 2.12(10); Parks & Wild. Code § 11.019.

In summary, the department must withhold the information that we have marked as being subject to sections 552.101, 552.117(2), and 552.130 of the Government Code. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

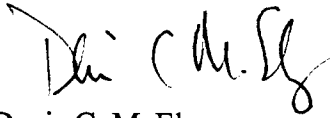
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "D.C. McElroy", written in a cursive style.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 164592

Enc. Marked documents

c: Mr. Gene David Ramage
3024 Oak Valley Drive
Bedford, Texas 76021
(w/o enclosures)